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IN THE

Supreme Court of the United States

October Term, 1958

Number 788

L. WALTER HENSLEE, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals for the Fifth Circuit

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To the United States Court of Appeals for the Fifth Circuit

Petitioner L. Walter Henslee prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on January 14, 1959.

CITATIONS OF OPINIONS BELOW

The opinion of the Court of Appeals printed in Appendix B hereto *infra*, p. 26, R. 595, as yet unreported reversed and set aside the convictions and judgments of the District Court on Counts 1 and 5 and directed that as

to them the trial court enter a judgment of acquittal and affirm the convictions and judgments on counts 2, 3, 4, and 6. R. 605.

JURISDICTION

The Judgment of the Court of Appeals was entered on January 14, 1959. R. 605; p. 26, *infra*. Timely Petition for Rehearing was filed on February 3, 1959, and denied on February 26, 1959. R. 624. Jurisdiction of this Court is invoked under 28 USCA, Section 1254(1).

QUESTIONS PRESENTED

In a prosecution for alleged violation of Title 18, USCA, Section 1012.—Public Housing Administration transactions, involving alleged false statements to the Public Housing Administration under the first paragraph and the alleged receipt of "compensation" under the second paragraph thereof, the following questions are presented as the basis for petition for certiorari to this Court.

I.

Whether an indictment is *valid* in the Federal Courts which seeks to charge criminal conduct on the part of an officer of an agency of the State of Texas which alleges matters of substance by the symbol "*and/or*" relating to rentals from property with reference to which Federal jurisdiction of the defendant and the state property depends.

(a) If "*and/or*" criminal pleading is permissible in the Federal Courts, whether the Government may be required to elect as to which of specifically pleaded alternatives it will rely upon to demonstrate Federal jurisdiction and the commission of a Federal crime.

(b) Whether failure to request a bill of particulars is effective to make such an indictment good.

(c) Whether an indictment employing the symbol *"and/or"* with reference to material matters, is sufficient pursuant to Constitutional guarantees requiring that the accused be informed of the nature and cause of the accusation against him, and *definite* enough that he may be protected by plea of *former* jeopardy against another prosecution for the *same* offense.

II.

Whether a defendant alleged by Government counsel to have concealed from local housing Commissioners the existence and deposit of rental received from "off-site properties" claimed to be a part of a low rent housing project pursuant to an "intent to defraud" alleged in the indictment, who calls as a witness on *direct* examination a Housing Commissioner who testified to their knowledge of a special bank account authorized by such Commissioners to *receive* rentals generally from such "offsite properties" and to *maintain* such properties until disposition, is entitled on *re-direct* examination to delivery and inspection of a particular written document represented by Government counsel on *cross-examination* of the witness to be a prior statement taken by the Government from the Commissioner where the prosecutor reads an alleged "excerpt" which is claimed to be a denial of such knowledge by the witness, *and the witness requests the statement* and also refers the Court to the whole statement.

III.

Where the trial Judge engaged in a long, sharp and critical examination of defendant's key witness called to testify to matters of official concern, whether such conduct on the part of the trial judge, implying by the continued insistent asking of the *same* question, and directions to Government Counsel to "Read it again", a lack of belief of the witness by the Court and a conviction that the witness was perjuring himself, did not constitute error so prejudicial to the defendant as to deny him a fair and impartial trial.

IV.

Whether due process was afforded the defendant in permitting the trial and introduction of claims of embezzlement on Counts 1 and 5, which were dismissed by the Court of Appeals as charging no Federal offense, with the remaining counts of the indictment, charging a failure to report rents to the Public Housing Administration.

V.

Where the alleged violation of duty consisted of a failure by the Executive Director of a local *State controlled* housing authority to report the receipt of rentals from a low rent housing development, *conditionally entitled* to Federal aid, does venue lie at the place of the required performance of the duty to report the rents, or at the place where the report, excluding the rents, was prepared and composed before mailing to the Public Housing Administration?

STATUTE INVOLVED

Title 18 USCA, Section 1012. It is printed in Appendix "A", *infra*, page 25

STATEMENT

Petitioner was convicted in the United States District Court for the Southern District of Texas on an indictment charging violation of Title 18 USCA, Section 1012, Public Housing Administration transactions.

Counts 1 and 5 charging the receipt of a stated "compensation" collected *as rentals* from property alleged to be within a local housing project of the City of Galveston, Texas were dismissed by the Court of Appeals and the defendant ordered *acquitted*, because such sums did not constitute "compensation" within the meaning of the Federal statute. R. 595, 605. The major thrust of the trial proceedings pertained to the effort of the Government to prove that the defendant received, embezzled and stole such rentals from the *State agency*.

The Court of Appeals affirmed Counts 2, 3, 4 and 6, charging failure to report the rentals to the Public Housing Administration. In each count the property from which the rentals allegedly were derived and the Federal character of which was necessary to be sustained for Federal jurisdictional purposes was joined by the symbol "and/or". The Trial Court refused to dismiss the indictment as stating *no offense* and refused to require the Government to elect which allegation would be relied upon so that a judgment could be pleaded as prior acquittal or conviction. The evidence and proceedings at the trial may be summarized as follows:

Petitioner was Executive Director of the Galveston Housing Authority, a State agency, hereinafter called "local housing authority". About June, 1951, the local housing authority purchased a lot at 1015 30th Street

in the City of Galveston, Texas as part of a program of resettlement of parties from premises sought as the "site" of a future housing project and moved a 4-unit apartment house thereon in January, 1952, R. 82-83. In May, 1952, it acquired the lot property at 1619 M Street. R. 84.

In April, 1952, the local housing authority began to collect rents from the 4-unit apartment on 30th Street by employees of the local housing authority in its office, and an L. Walter Henslee "Special Account" was opened to receive those rentals in October, 1952. Total deposits constituted $5,995.71, all of which was derived from the 30th Street property. The total alleged in the indictment for the period was $6,025.71. All of the rentals from the 30th Street property were deposited in this Special Account. No rents from the M Street property were deposited in this Special Account, but minor sums were deposited in a special "Trust Account" for the M Street property.[1] R. 106-7. About November 4, 1952, *after* the acquisition of both properties, the Public Housing Administration and the local housing authority entered into the Assistance Contract in evidence dated November 4, 1952.

This is the third trial on the same indictment. At the first trial, Counts 7 and 8, charging excessive salary and the acquisition of a motor vehicle for the personal use of defendant were eliminated. A conviction on a second trial on the remaining six counts was reversed by the

[1] It appears that the inclusion of the M Street property "1015 30th Street and/or 1619 M. Street", in the indictment was for the purpose of permitting the introduction of testimony that local housing authority funds were used on such property as a matter of prejudicial inference, but it cannot be correctly demonstrated that the specific sums pleaded in the indictment constitute any part of the rents from the M Street property.

Court of Appeals, *Henslee v. United States*, 246 Fed. 2d 190 because of prejudicial publicity created by Government trial counsel below. Trial counsel for defendant in the two previous trials having died present defense counsel was employed a short time before the trial.

The Court declined to dismiss Counts 1 and 5 which charged acquisition of the rentals with *intent to defraud* and to *convert the rentals to his own use*, on the ground that the Court of Appeals had sustained them. R. 18. The trial centered about attempts of the Government to prove the *larcenous acquisition* of the rents by defendant and to brand the defendant a thief in the eyes of the jury as to all of the sums pleaded in the indictment, with minor, almost casual treatment of the alleged failure to report the rents to the Public Housing Administration.[2]

The Government introduced a mass of documents pertaining to the costs of rehabilitating the M Street property, although this was immaterial to the *sums* mentioned in the indictment and gave a false cast to the presentation because

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[2] Of the sums deposited to the Special Account four items were ultimately questioned as having constituted **unreimbursed** items from the Special Account—an item of $1,000.00 for the initial installment payment of a concrete coating process franchise, issued in the name of the defendant but actually also used to "Brikote" local housing authority property; and an item of $370.85, alleged to have been used by the defendant to electrically rewire his private office. R. 111. The check stubs for the Special Account show this amount as cost of rewiring the 30th Street 4-unit apartment. The Public Housing Administration Auditor testified that the local housing authority records show it paid none of this cost directly. See Exhibit 3 to Brief for Appellant in the Court of Appeals, listing all checks of the Special Account. The motion of **new** counsel to **reopen** to permit the careful tracing by newly discovered documentary proof of all funds including 2 items of $475.00 and $273.50 **into property of the local housing authority** was overruled.

the jury necessarily assumed that these sums used to rehabilitate the M Street property, were sums stolen by the defendant. The joinder of the M Street property by the symbol "and/or" to the 30th Street property rendered this mass of data admissible because mentioned in the indictment, although having no relationship to rentals from the M Street property which were deposited in another account.

The prosecution claimed that the Commissioners of the local housing authority were deceived and had no knowledge of the Special Account in which the rentals from the 30th Street property were deposited, but it *did not produce* any Commissioner to so testify. The Defendant called Mr. Sonderup, Housing Commissioner during the relevant period, to testify to such official knowledge and the official creation of a special bank account to receive rents from and to maintain "off-site" properties. R. 337-353. On *cross-examination* he testified that he had been interviewed several times by Government investigator, but was hazy as to the exact time and the nature of the conversation. The witness referred the Court to the "deposition" which he had given. The District Attorney then asked if he recalled making a definite quoted statement that he knew nothing about a special account to which was deposited rentals from the "1015 - 30th, *rear*" (no such address). The witness replied that addresses meant nothing to him then or at the trial. The Court again asked if he had said that he did not know anything about the Henslee Special Account, and the witness replied to the Court "At this time I don't know, *whatever that record says*, that's what it is Judge, if you don't mind". The Court then queried, "do you deny it now making that statement to this man?" and the wit-

ness replied, "No I don't deny it". The prosecutor failed to produce the statement from which the alleged excerpt was taken for the witness. On *re-direct* examination counsel for the defendant demanded the statement. The Court refused to order it delivered on the ground that "he (the prosecutor) has not offered it in evidence".[3] The witness reiterated that he was not familiar with specific addresses, such not being on the Commissioners' level, but he knew Henslee had a special account for rentals from "off-site" properties. The Court from that point engaged in a *long, sharp* and *critical* examination of this witness with a plainly inescapable inference to the jury that the witness was guilty of perjury. The Court asked *again* whether the witness knew of the account "at the time you were a commissioner, back in "'52 and '53". Immediately after the reply, the Court again said "and *you are telling me* that you are aware of the fact that Mr. Henslee had a *so-called* Special Account and deposited these rentals in it?" Upon an affirmative reply, the Court demanded to know *"why"* the witness was "unable to deny making the *contrary statement* that counsel just asked you about, Mr. Sonderup?" Upon being advised, "Well, I wonder if it was the same question, Judge?" the Court stated, "Well read it again, just so there may be no uncertainty", and further stated upon interposition of defense counsel, "I think counsel is entitled to cross-examine any way he wants to". The prosecutor then, under instructions of the Court, purported to again recite the alleged prior inconsistent statement of the witness. The Court then asked the witness if he remembered the occasion when he made a statement to an investigator on a

[3] The Court did not deny production as a matter of **"discretion"**. Production was refused because the Government had not "offered it in evidence."

certain date and upon receiving an affirmative reply, again repeated the *same* question, "did you make the statement to him then that you don't know anything about the Special Account?" The witness agreed that he had made the statement but stated, "but we are dealing with two different matters, Judge, one was an off-site property, and this is—". The Court told him to *"forget about* off-site properties", and although the witness had answered the same question many times, the Court again asked, "did you know there was such an account in 1955 when you made that statement?", and being advised that the witness "knew about this one they asked me here about a minute ago", the Court then demanded, "well, then how do you explain the statement counsel just read?", and the witness in the confusion resulting from the critical examination by the Court implying a disbelief in his statements and containing the unveiled suggestion to the jury that he was lying, answered, "but it was for the—you have told me, Judge, not to use the off-site—" at which time the Court stated, "well, read it again, *will you Mr. Kroll*". The witness again stated, "as far as we are concerned, if you don't mind, it is very distinctive". The prosecutor then purported to read the alleged contradictory excerpt again under instructions of the Court, at which time the Court stated, "you may give *me* any explanation you care to, *now*, as to *why you made that statement*". R. 352. Again the witness did so and reiterated, "it seems to me we are talking about two different things here".[4]

[4] It is difficult to believe that the specific excerpt put to the witness and to the jury was contradictory had actually been given by the Commissioner; otherwise, in view of the stated contention of Government counsel that the Commissioners had no knowledge of the Special Account, the Government would certainly have called the Commissioner to prove this lack of

The Court thus identified himself with the prosecution by his cross-examination while rendering the witness and defendant's counsel helpless. *On the material issue of "deceit" the damage caused by this prejudicial intervention by the Court was irreparable and stemmed from the Court's misunderstanding of the law that the statement was not producible as a matter of law on demand because the cross-examiner had not "offered it".*

The reports including rents were filed in the District of Columbia, with the Public Housing Administration, but were *prepared* and *mailed* in the Southern District of Texas. Seasonable Motions for acquittal because of failure to prove venue were filed were overruled.

The Court of Appeals held the "and/or" pleading did not render the indictment defective; it misconceived the argument that the proof did not show jurisdiction over the "off-site properties" because the specific contractual obligations between the Public Housing and the local housing authority *at the date of acquisition* of the off-site properties were not shown, and the subsequent contract of November 4, 1952, R. 144, did not cover the properties in the indictment; because not in existence at the time; that the *facts of* venue were proved pursuant to Title 18, USCA, Section 3237, because the document which did not report the rents was "prepared in one district and mailed to another". R. 595. It found no error in the failure to permit the witness Sonderup to see the alleged statement

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knowledge. Failure to do so supports the inference that there was, in fact, no such prior statement as read to the jury. The Court assumed there was such a written statement denying knowledge and that the witness was lying. The witness was willing to stand upon it as not being in conflict with his testimony, but it was not produced for him as his adopted statement on his request nor to defense counsel.

read to the jury on cross-examination as inconsistent with his testimony, in failure to require delivery of such statement to defendant's counsel, nor in the whole of the Sonderup examination.[5]

REASONS FOR GRANTING THE WRIT

1. The approval by the Court of Appeals of the employment of "and/or" pleading a form of disjunctive and alternative pleading, which is a stranger to the Federal practice with respect to essential facts, which must be proved to show a Federal offense, raises questions of clear importance and policy in the administration of the Federal criminal law.

The *indictment* charged the conversion of rents from two properties impressed with a Federal character and a failure to report such rents to the Public Housing Administration. Proof of origin of the rents from specifically identified properties impressed with a Federal character was essential to prove a Federal offense. These allegations did not purport to plead supporting evidence but facts necessary to sustain proof of Federal jurisdiction and the charge itself nor were they surplusage.

The purpose of the pleader is plain; by adding "and/or 1619 M Street" a mass of data was thereby made "*per se*" admissible without the implied certification of counsel that such additional reference was made in good faith and consistent with the obligations of the United States not to use the power to indict for its convenience or for other than legitimate purposes. This type of pleading resulted

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[5] The trial was burdened throughout with the imponderable effect of the unfair charges of embezzlement and the evidence offered thereon, which did not charge a Federal offense.

in the introduction of a mass of data in no manner connected with the rent deposited to the special account dedicated to the rents from 1013 30th Street. (The rents from 1619 M street were deposited in a "Trust Account".) It permitted a mass of irrelevant data to come in with no power to exclude since it related to a specific property pleaded in the indictment.

The indictments did not comply with the commands of Rule 7 (c) of the Federal Rules of Criminal Procedure that it be a "plain, concise and *definite* written statement of the *essential facts* constituting the offense charged."

Likewise, it afforded no clear basis for a criminal judgment of "Guilty" or "Not Guilty". The essential requirements of indictments have been many times expressed as furnishing adequate notice of the facts constituting the exact charge to a defendant presumed to be innocent and without knowledge of the facts, (see *Fontana v. United States*, 262 Fed. 283 (8th Circ.) for an exceedingly clear and adequate statement,) and protecting against a *subsequent* prosecution for the *same* offense charged. *U. S. v. Behrman*, 258 U.S. 280, 289. (1922.)

Of three uncertain possibilities, it is impossible to determine whether the jury found that the defendant failed to include rents from 1015 30th Street, 1619 M Street, or *both* of these properties. The verdict of "Guilty" as to these Counts II, III, IV and VI does not establish either possibility with such certainty that it can be found that the jury made any determination whatever. How, then, with such an indictment could the Defendant in a future trial for failure to report rents from "1619 M" for example, show that he had already been in jeopardy and had been tried for the "same" offense?

While the Court of Appeals holds the indictment valid it suggests that a Bill of Particulars would have furnished relief, but this ignores the fact that the granting of such Bills are in the discretion of the Court and would not have furnished any more information as to the identity of the property than already appeared on the face of the indictment. The problem is not the identity and existence of specific properties. Obviously, a prosecution for failure to report rentals from *one* such property would not exhaust the prosecution possibility with reference to rentals from *another* such house not reported properly. A motion requiring the Government to elect was notice of the inadequacy of the attempted charge but it, as were all these Defendant's motions, was overruled.

The ruling of the Court of Appeals ignores the fact that for all practical purposes, the function of a Bill of Particulars is limited to situations not encompassed here. And further, that a Bill of Particulars does not make a bad indictment good, but simply operates to give the Defendant facing a *good* indictment further information. *Floren v. U. S.*, 186 Fed. 961. *Evans v. U. S.*, 153 U.S., 584. The Federal Rules of Criminal Procedure have not affected this basic rule of criminal jurisprudence

A Bill of Particulars is not a permissible mechanism for returning a new and different indictment which, of course, is the exclusive function of a grand jury.

The ruling below is misguided and puts power in the hands of the prosecution and courts not compatible with the Constitution and seems important enough in its consequences to future criminal law enforcement to call forth the corrective powers of this Court.

2. The witness Sonderup having been impeached by proof of prior inconsistent statements for all practical purposes insofar as the distorted impressions given and their influence on the jury on the sub-conscious level were concerned, the *identical* statement to which the witness referred when shuttled from general testimony to a specific statement allegedly made was highly material, not necessarily only to introduce former consistent statements in support of the witness where the impeachment has been by a prior inconsistent statement, but also under the *Rule of Completeness* that if one party introduces part of a document his opponent may offer the contents of the remainder of the document, or require his advisary to do so, insofar as the remainder is competent and relevant. *Crawford v. U. S.*, 212 U.S. 183 (1909).

The Court's ruling that Defendant's counsel was not entitled to inspect the statement because it had not been "offered in evidence" ignored the function of examination of witnesses. The Defendant was entitled to demonstrate the truth on redirect and was not required to wait until the Government might seek to introduce this statement later, for it might never do so. The witness had, himself, offered the statement to illuminate the situation. His testimoney, as given, was subject to claims of fabrications. He recognized it and, in effect, made a part of his answer the statements made in the alleged statement. The Defendant's counsel was entitled to inspect the statement and to offer any part of it, *either* as *direct substantive evidence* of the matters therein stated, fortified by the fact that the witness was present on the stand and that such statements would not be hearsay for that reason and to show *the facts* of consistency. To say that the remainder of the statement

is not in itself substantive evidence has been termed by Wigmore as "an artificial doctrine tending to a quibble". Student's Textbook on Evidence, Page 322 (1935). See McCormick on Evidence, Page 132, although *Townsend v. U. S.*, 106 Fed. 2d 273, Syl. 1 (CCA 3rd 1939) states that when the *sole* purpose of introducing the prior statement is to *support the credibility* of the witness, is not "substantive" evidence (dictum). The old case of *Ellicott v. Pearl*, 10 Pet. (U.S.) 412, 439, 9. L. Ed. 475, 486 (1836) seems to hold that impeachment by inconsistent statements does not open the door to support by proving consistent statements. It is submitted that this should not be the modern view of this Court. Here, the Government asserted also a *recent contrivance* to give false testimony, and under these circumstances, the 8th Circuit has held that where the attack on credibility by inconsistent statements "is accompanied by, or interpretable as, a charge of a plan or contrivance to give false testimony, then proof of a prior consistent statement before the plan of contrivance was performed, tends strongly to disprove that the testimony was the result of contrivance" McCormick, p. 109, states "Here all Courts agree". *Affronti v. U. S.*, 145 Fed. 2d 3, Syl. 7, 9. states that the rule is discretionary. See 4 Wigmore, Evidence, Section 1129; Note 140, ALR 21, 93-128.

The Court, however, did not purport to exercise "discretion", if any. He frustated immediately the effort of the Defendant's counsel to secure the original document for inspection on the ground that the Government had not offered it in evidence, R. 349. For all practical purposes it, if a genuine statement had been offered by the witness himself and *adopted by him as* part of his answer, and the production of the exact statement was necessary to

fully understand his answers given on direct and cross-examination.

The Third Circuit has held in *Cafasso v. Pennsylvania Railroad Company*, 169 Fed. 2d 451 (3rd Cir. 1948), that if some portions of a statement made by a witness are used on cross-examination to impeach him, other portions of the statement which are relevant to the subject matter about which he was cross-examined may be introduced in evidence. The doctrine of Jencks, 353 U.S. 669, required the production. This demand for a specific document shown in Court by Government counsel was not a blind fishing expedition. As stated by this Court in the Jencks case, "Flat contradiction between the witness's testimony and the version of the events given in his report *is not the only test of inconsistency*. The omission from the report of facts related at the trial, or a *contrast in emphasis upon the same facts*, even a different order of treatment, are also relevant to the cross-examining process of testing the credibility of the witness's trial testimony." This analysis is applicable here.

The major point of the Government's case was proof of an *intent to deceive*. Government counsel advised the Court that he was "surely" contending that "the Commissioners did not know that there was this special account". (R. 345)

Had the Government called Sonderup, the statement taken from him as its prospective witness must have been produced on cross-examination by the defendant. *Jencks v. U. S.*, 353 U.S. 657.

The inspection was of right, but the Government here broadened the inquiry on its cross-examination to refer to

specific properties and to the extent of its questions expanding the scope of the direct examination it made Sonderup its witness as to such specific addresses of property. When the witness came to defendant's counsel on re-direct examination, he was entitled to cross-examine as to such specific matters which had been brought out on cross-examination which were not the subject of the direct examination and to have produced the alleged statement from which the excerpt was taken under the authority of the Jencks decision, 77 Sup. Ct. 1014 or, as noted in *U. S. v. Reynolds* "The rationale of the criminal cases is that, since the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense", 345 U.S. at page 12, 73 Sup. Ct. at page 534. The Jencks case specifically approved this philosophy and implemented it in a just and practical way. It is material to note that the headnote of the Court in the United States Supreme Court Reports pertaining to the above statement in Reynolds uses the word "evidentiary" rather than "governmental", indicating that the ruling was not necessarily confined to litigation involving the sovereign.

The ruling below has no relevancy to modern conditions when the Government has developed an investigative process dedicated to securing the facts before they become subject to errors of recollection consistent with the modern psychological understanding that the closer, in point of time, the statement is to the event itself, the smaller the chance of error.

Inspection *as of right* demanded by defendant's counsel is not an innovation. *Wright v. Bragg*, 96 Fed. Rep. 729.

733 cert. den. 186 U.S. 486. The Fifth Circuit has heretofore held that where the defendant uses a part of a statement on cross-examination of a witness for the purpose of impeaching him, the entire statement is admissible on redirect examination. *Powers v. U. S.*, 294 Fed. Rep. 512. The ruling below is flatly in conflict with the principle involved.

Closely bound up with the exact point in issue is the fact that the document was not delivered to the witness or shown to him even though he specifically desired it. The examination conducted violated the basic rule in Queen Caroline's case, 2 B&B 284, 286-90, 129 Eng. Rep. 976, 11 Eng. Rul. C 183. In 1884 in the *Charles Morgan v. Kouns*, 115 U.S. 69, 77 the Court states "If the contradictory declaration is in writing, questions as to its contents, without the production of the instrument itself, are ordinarily inadmissible, and a cross-examination for the purpose of laying the foundation for its use as impeachment, would not, except under special circumstances, be allowed until the paper was produced and shown to the witness following examination. Circumstances may arise, however, which would excuse its production. All the law requires is that the memory of the witness shall be so refreshed by the necessary inquiries as to enable him to explain, if he can, and desires to do so."

The basic rule then declares *for* production and excuses production only under exceptional circumstances where the memory of the witness is so refreshed by the inquiries to make explanation. Here the witness could make no explanation; his memory was not refreshed except generally; his testimony was contradictory on its face, but the witness desired the statement to show that it was not, in fact,

contradictory to his testimony. Here he referred to the full statement.[6]

The Government on appeal took no responsibility for the clear representation to the witness and accepted by the Court and defense counsel that the excerpt given was exact and came from a written statement of the witness. If there was no such statement in the form and words used from the source purported, then the Government has, in effect, created evidence and denied the defendant a means to rebut it. The Solicitor General, pursuant to rules followed by his office, implicit in cases where error is confessed, will doubtless certify whether there was in fact such a statement signed by the witness containing the excerpt, or whether the facts are otherwise. The trial court, the witness, defense counsel and the Court of Appeals all considered the exchange to refer to a prior statement of the witness reduced to writing and signed by the witness. The jury could not have thought otherwise.

The ruling of the Court below in this case is in direct conflict with *Kimble v. Kayser* (CA 4, 1932), 59 Fed. 2d 626, 628.

3. As a part of the consideration of the foregoing paragraph, Appellant contends that the proceedings in the trial court so far departed from the usual course of criminal proceedings that the supervisory powers of this court should

[6] Curiously enough, the Government counsel writing the brief on appeal in the Court of Appeals, took the position that there was no evidence in the record that there was a writing in the sense that the witness signed it or had written it himself, stating, "It was simply an oral statement to the investigator which was reported to the prosecutor in a written report; therefore it was not such a statement that could be shown the witness." Government's Brief, page 29.

be exercised to differentiate the wholly different functions of the court from those of counsel and to furnish light to the lower courts on the bounds of proper examination by trial courts. The principle firmly set out *American Motorists etc. v. Napoli*, 166 Fed. 2d page 24, 26 (7th Circuit 1948) illustrates a state of facts involving the sharp pursuit of a witness in the same fashion evident here. The district judge, in putting the same question to the witness again and again inevitably impressed the jury that the court regarded this key witness' efforts to be specific as constituting perjury. It seems important in Federal criminal Jurisprudence to insure that proper conduct of criminal trials do not allow for unlimited discretion of the trial court. The proceedings denied defendant a fair and impartial trial.

4. At the first appeal of this cause, reversed because of prejudicial action of the United States Attorney, the court made certain statements which were utilized by the trial court as a basis for refusal to dismiss the embezzlement counts (Counts one and five). The indictment in this case was returned after a similar indictment had been dismissed in a prior case in the same district.

The defendant has never had a fair trial on those counts which state a federal offense. The reluctance of the Appellate Court to reverse for a fourth trial is not a valid reason for affirmance. The first trial removed two counts from the indictment; the second trial was reversed for prejudicial conduct of the Government. *All trials, including the last, were burdened with the prejudicial effect of direct accusations which stated no Federal offense, but constituted the real basis of the trial itself which accusa-*

tions were coupled with the "and/or 1619 M" recitation in the indictment which denied the exclusion of any of such matter since it pertained to the specific charges and to a specific address.

Due process requires a reversal for trial exclusively on the Federal offenses charged. Evidence of specific matters which might be admissible under a rule of admissability would have been confined to relevant matters in the indictment with familiar *specific limitations* thereon which were not available in the trial below.

The rule that a conviction may stand if the sentence does not exceed what may be imposed on a valid count (note 6 *Rovario v. U. S.*, 353 U.S. 53, 60), is not applicable where the defective counts are not matters of federal concern and simply constitute an evasion of the rules restricting admissability.

CONCLUSION

Because of the importance of the questions raised in the administration of the Federal Criminal law, with reference to demands for inspection of statements of witnesses in the hands of the Government taken from their own prospective witnesses and the desirability of settling by authoritative decision the obligation of an examiner representing the existence and content of a written statement of a witness, and the further desirability of an authoritative decision fixing the bounds of pleading permissible under the Federal Rules of Criminal Procedure, and in view of the conflicts of the appellate courts on the

questions raised on these issues, it is respectfully requested that this petition be granted.

Respectfully submitted,

JOSEPH W. CASH
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Houston 2, Texas

Certificate of Service

I hereby certify that a copy of the foregoing Petition for Writ of Certiorari was mailed to William B. Butler, United States Attorney, 218 Post Office Building, Houston 2, Texas, and to Solicitor General, Department of Justice, Washington 25, D. C., postage prepaid, on this ____ day of March, 1959.

JOSEPH W. CASH

APPENDIX A

Sec. 1012. Public Housing Administration transactions.

Whoever, with intent to defraud, makes any false entry in any book of the Public Housing Administration or makes any false report or statement to or for such Administration; or

Whoever receives any compensation, rebate or reward with intent to defraud such Administration or with intent unlawfully to defeat its purposes; or

Whoever induces or influences such Administration to purchase or acquire any property or to enter into any contract and wilfully fails to disclose any interest which he has in such property or in the property to which such contract relates, or any special benefit which he expects to receive as a result of such contract—

Shall be fined not more than $1,000 or imprisoned not more than one year, or both. As amended Oct. 31, 1951, c. 655, Sec. 26, 65 Stat. 720.

APPENDIX B

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 17140

L. WALTER HENSLEE,
Appellant,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Southern District of Texas.

(January 14, 1959.)

Before HUTCHESON, Chief Judge, and CAMERON and BROWN, Circuit Judges.

HUTCHESON, Chief Judge: On defendant's former appeal[1] from his conviction, this court, while stating that there was ample evidence as to the offense charged and that we thought that the trial court did not err in

[1] Henslee v. United States, 246 F. (2) 190.

construing the law or submitting the case to the jury on the record as made, we did not affirm the conviction on any of the counts. Instead, because of the unjustified and prejudicial publicity which resulted from inappropriate action taken by the United States Attorney during the trial, we reversed and remanded the cause for trial anew.

Tried again, this time on a new and, to some extent, a different record, and convicted on all counts, defendant is here seeking reversal, this time with different counsel and a different approach and, to some extent, making different contentions. Because this is so and particularly because in what we said in regard to the former record, we did not in fact intend to, nor did we in law settle the law of the case for another trial or foreclose a re-examination here of the record, we have given the disposition of the case this time fresh and careful consideration in the light of the present record and the contentions now made, free of any preconceptions or prejudgments arising out of the former appeal, or of what was said by us in connection therewith.

In number many but, by proper grouping, in substance few, appellant's specifications of error may be briefly stated and each may be as briefly disposed of in its turn.

The first contention is that the indictment does not state an offense because (a) the use of the words "and/or" renders all counts fatally defective, (b) counts one and five do not charge "the receipt of compensation" within the meaning of the statute, and (c) counts two, three, four and six do not allege facts showing federal jurisdiction.

For the reasons to be hereafter stated, we agree with appellant's subdivision (b) as to counts one and five. We disagree with him, however, as to subdivision (a) and (c).

Of the complaint in subdivision (a) of the use in the reference to the property with which the indictment is concerned of the expression "and/or", we think it clear that its use did not constitute a defect in the indictment by making it obscure and thereby depriving it of certainty and otherwise failing to put the defendant upon notice of what he was charged with. This language appears in a reference to the property from which the rentals dealt with were collected, and the statement, that the rentals were either collected from both of the properties named or from one or the other of them, was sufficient to put defendant on notice of the nature of the evidence which was expected to be offered. Certainly they did not create a defect in the indictment which would vitiate or destroy it. At the most, they furnished defendant an opportunity to require the government by bill of particulars to make a more definite statement, and this was not requested. Basically, however, the use of "'and/or" did not make the indictment defective, because it was thereby in substance charged that rentals had been collected from either or both of these properties and proof under the charge that he collected from either one or both of them would have been sufficient, and there was such proof.

Of subdivision (c), the contention that counts two, three, four and six do not allege facts showing federal jurisdiction, it is sufficient to say of it and the argument in support that it is wrongly based upon the view

that, since the title to the property was in the Galveston Housing Authority and not in the United States, Congress could not make it a federal offense to make false reports to the Public Housing Authority with respect to it. Under the detailed showing of the statutory plan or scheme of government aid to, and cooperation with, state housing authorities, it is too plain for discussion that the Public Housing Administration of the United States was entitled to demand and to receive reports from the Galveston Housing Authority; and Congress, therefore, had the right and power to make criminal the making of false reports with respect to matters which the evidence here undisputedly shows were, under the statutory plan, matters of federal concern.

Appellant's basic view of the matter, that the question of the authority of the government to require the making of reports depends upon questions of who owned title to the property with which the reports were concerned, will not at all do. Each, the government and the state, had a function in the overall activity, each acted in concert and cooperation with the other. The federal statute constituted an appropriate means of keeping the situation under control and of protecting the interests of the government in the various projects.

The contention in subdivision (b), however, that counts one and five do not charge, and the proof does not show, the receipt of compensation within the meaning of the statute, is, we think, well taken, for the reasons carefully set out in the opinion of Judge Allred in *Blum v. United States*, . . . F. Supp. . . . There stating, "The question arises, therefore, Were these rentals

'compensation' as used in the statute and as charged in count one in the indictment? I do not think so.", the court went on to say:

> "That portion of the statute (18 USCA 1012) upon which count 1 is based reads:
>
> 'Whoever receives any compensation rebate, or reward, with intent to defraud such Authority or with intent unlawfully to defeat its purposes; . . . .
>
> 'Shall be fined not more than $1000 or imprisoned not more than one year, or both.'
>
> "The ordinary meaning of 'compensation' is remuneration or recompense. It is not necessary to quote the many definitions from dictionaries because none of them fit defendant's conduct here. The money was paid to him in his official capacity as *rents*, not as pay, over-payment, remuneration, rebate, reward, bribe or gratuity for some favor or dereliction. It belonged to the Houston Housing Authority. Defendant misused, misapplied or embezzled it. State law punishes embezzlement and kindred crimes. But no Federal law reaches embezzlement of funds or property by an officer or agent of a Housing Authority created under state law. Certainly the statute prohibiting receiving 'compensation' does not cover such embezzlement. If it did, then every employee of a local authority, even a janitor, would be subject to prosecution in the federal courts for theft, conversion or embezzlement. Congress never intended that the national courts should take over the functions of the local courts in any such fashion."

Appellant's second contention, stated in several ways, in general constitutes an attack upon the evidence as insufficient to prove the facts essential to a conviction. His most argued point is that the essential facts of venue, as alleged in counts two, three, four and six, were not proved, in that the evidence shows that the offense was committed in Washington, D. C., and not in the Southern District of Texas. A second point is that for the reasons advanced by him in connection with the sufficiency of the indictment, the federal court had no jurisdiction of, or to require reports as to, the rentals from the property described, because they were not proven to be either the property of the government or a part of the local housing authority project site. The third is that there is no sufficient proof that appellant caused the filing of the reports; while, finally, it is claimed that the proof failed because the identity of the specific reports introduced in evidence was not sufficiently established.

An examination of the arguments in the light of the record shows, we think, that none of them are well taken. The first and most argued claim, that the facts of venue are not proven, is refuted, we think, by Sec. 3237, Title 18 U.S.C.A., which clearly provides for venue to be either in the Southern District of Texas or in the District of Columbia, where a false statement is prepared in one district and mailed to another. Cf. *DeRosier v. United States*, 218 F(2) 402 (5 Cir.); *United States v. Miller*, 246 F(2) 486; *Palliser v. United States*, 136 U.S. 257.

The statute forbids and the indictment charged, and the proof showed; the making of false reports as charged;

that they were prepared under the direction and supervision of Henslee and by his authority; that this was done in Galveston; and that in a true legal sense Henslee caused the reports to be prepared and made.

As to the identity of the specific reports introduced in evidence, the record we think shows conclusively that the district judge did not err in admitting these reports in evidence as the matter stood on the record. Every intendment was in their favor, nothing was shown to impeach or discredit them, and we are of the clear opinion that the attack upon them is without real substance.

In addition to these general complaints, appellant, making a specific attack upon the evidence as insufficient to sustain a finding of guilt on count six, supports it by putting forward, as having controlling bearing, the facts that before this report was made the Henslee special account had been closed out, the money remaining in it had been turned over to the housing authority and auditors, and the auditors' reports took this balance into their accounting.

The argument is that, since the special account was not then in existence and the auditors knew all about it, it cannot be said that the failure to take into account, in making the report, the collections made from the off-site property, was material or could be fraudulent, an argument, we think, which completely overlooks the nature of the charge in the counts dealing with the false reports. This is not that Henslee took or kept money that did not belong to him, but that, in making his reports to the Public Housing Administration, he, for the purpose of concealing the existence of these rental

receipts from it, failed to show them in his reports. The fact that the account had been closed a short time before and the auditors had taken the balance on hand in it into their accounting was not an answer to the charge that a false report to Public Housing, consisting in part of the failure to show or take into account these rental collections, had been made by Henslee.

A further complaint firmly made and strongly argued is that the witness Sonderup, whom defendant put on the stand to prove that the Henslee special account was not something kept secret but that, on the contrary, he and other members of the Galveston Housing Authority knew about it, was cross-examined about a prior statement made by him and reduced to writing, which it was claimed was contrary to the testimony he was then giving and that neither Sonderup nor the defendant's counsel was permitted to see the statement.

Upon a careful reading of the record, it seems clear to us that the complained of action was not prejudicial error. The colloquy, which went on and in which the court, both counsel, and the witness had a part, shows: that Sonderup had a clear understanding of what was being inquired about; that he was given an opportunity to, and did, explain, that the former inquiry and answer made by him was not in conflict with his present testimony because the two matters inquired about were different. If, therefore, there was technical error in connection with the matter, it is plain that it was not so prejudicial as to require a reversal for what would be a fourth trial.

The same thing must be said of still another claim of error, that the district judge erred after both parties

had rested on Friday and the court had adjourned, until Monday, the submission of the case to the jury, in not permitting defendants then to reopen the case to introduce further specified matters. We have examined the offer carefully and are of the opinion that the district judge did not err in the exercise of his discretion in refusing to permit a reopening of the case. This is so, both because there was no sufficient reason shown why the evidence was not offered earlier and because if the case had been reopened and the tendered evidence introduced, it was of such a nature and with reference to such matters as that if it had come in, it could not reasonably have been expected to change or affect the result as to defendant. This is especially so since, as appellant points out in his brief, his purpose in offering it was to clear up matters dealt with in counts one and five, and we have set aside the judgment on those counts and directed a judgment of acquittal.

Finally, we are of the clear opinion that the appellant's claim, that the district judge erred in not submitting defendant's requested charges and defensive theories, is not well taken. The charge as a whole presented the case fairly and fully and gave effect to every reasonable claim of the defense. The charges asked of the district judge, the giving of which is now complained of, were in the main already covered in the main charge and such of them as were correct were not, in the light of the general charge, of such importance as to make the failure to give them prejudicial error.

The convictions and judgments on counts one and five are set aside and the cause as to them is reversed with directions to enter a judgment of acquittal. The con-

victions and judgment on counts two, three, four and six are affirmed.

A true copy

Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit

By Clara R. James,
Deputy

New Orleans, Louisiana
March 9, 1959